

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CORTEZ ROCKY TREADWELL,

Defendant-Appellant.

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UNPUBLISHED  
February 25, 2014

No. 312549  
Wayne Circuit Court  
LC No. 12-002817-FC

Before: HOEKSTRA, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during a felony (felony firearm), MCL 750.227b. He was sentenced as a second-offense habitual offender, MCL 769.10, to 45 to 68 years' imprisonment for the second-degree murder conviction, 2 1/2 to 7 1/2 years' imprisonment for the felon in possession conviction, and two years' imprisonment for the felony firearm conviction. For the reasons stated in this opinion, we affirm.

I. SUFFICIENCY OF THE EVIDENCE

This case stems from the shooting death of a teenager who was attempting to purchase a gun. The victim was shot inside of his cousin's car. The victim's cousin was driving the car, and testified that she and the victim were in the front seat when they picked up defendant and another man, who sat in the rear seat. The victim and defendant began to discuss the sale of the gun. Defendant indicated that he needed the money before he could get the gun, but the victim did not want to hand over his money before seeing the gun. The disagreement escalated, and the cousin observed defendant grab the victim around the neck. She turned and saw defendant and the victim in a struggle. Defendant had a black handgun in his hand and was using the other hand to fend off the victim, who was trying to gain control of the gun. She testified that she heard a single shot, then two shots, and then another single shot. The cousin identified defendant in a photographic lineup as the man with a gun who was struggling with the victim.

On appeal, defendant claims that he was denied due process because his second-degree murder conviction was based on insufficient evidence. Specifically, defendant argues that there was insufficient evidence to prove that the shooting was not accidental, and thus, there was insufficient evidence to demonstrate malice.

We review sufficiency of the evidence issues de novo. *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010). Due process requires that a reasonable trier of fact could find

each element of the crime established beyond a reasonable doubt, if the evidence is viewed in the light most favorable to the prosecution. *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002); *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). It is the trier of fact's role to judge credibility and weigh the evidence. *People v Jackson*, 292 Mich App 583, 587; 808 NW2d 541 (2011).

Second-degree murder is defined as a death, caused by the defendant, with malice, and without justification or excuse. *People v Portellos*, 298 Mich App 431, 443; 827 NW2d 725 (2012). Malice is "the intent to kill, the intent to cause great bodily harm, or the intent to take an action whose natural tendency is to cause death or great bodily harm, wantonly and willfully disregarding that risk." *Id.* Intent is inherently difficult to prove; therefore minimal circumstantial evidence is required to establish a defendant's intent. *People v Cameron*, 291 Mich App 599, 615; 806 NW2d 371 (2011). Intent can be inferred from the facts and circumstances of a case, *People v Kissner*, 292 Mich App 526, 534; 808 NW2d 522 (2011), including a defendant's acts, *Cameron*, 291 Mich App at 615.

We conclude that there was sufficient evidence for a jury to find malice beyond a reasonable doubt. The victim's cousin testified that just before the gun fired, defendant wrapped his arm around the victim's neck and refused to relinquish the gun, which the victim was attempting to purchase. Thus, this evidence demonstrates that either defendant fired intentionally or the gun went off during a struggle that he initiated. When viewed in the light most favorable to the prosecution, a rational jury could find that defendant's act of initiating a struggle over the gun demonstrated the intent to take an action whose natural tendency was to cause death or great bodily harm, wantonly and willfully disregarding that risk.

## II. SENTENCE ABOVE GUIDELINES RANGE

Defendant next argues that the minimum sentence for second-degree murder exceeded the high end of the applicable minimum sentencing range, it was disproportionate, and it was cruel and unusual punishment. Constitutional issues, including whether a sentence is cruel or unusual, and the proper application of the legislative sentencing guidelines are legal issues that we review de novo. *People v Benton*, 294 Mich App 191, 203; 817 NW2d 599 (2011). This Court must determine if the minimum sentence was within the appropriate guidelines range or the trial court had a substantial and compelling reason for departing. *People v Babcock*, 469 Mich 247, 255-256; 666 NW2d 231 (2003). Generally, when a sentence is within the guidelines range, this Court must affirm unless the sentence was based on a scoring error or inaccurate information. MCL 769.34(10); *Babcock*, 469 Mich at 261.

The minimum sentencing guidelines range for defendant's offense variable and prior record variable levels, for second-degree murder, was 315 to 525 months in prison or life. MCL 777.61. However, defendant was sentenced as a second-offense habitual offender, MCL 769.10, which increases the statutory guidelines minimum sentence to 315 to 656 months in prison or life. MCL 777.61. Defendant was sentenced to a minimum sentence of 45 years in prison, which is the equivalent of 540 months. Therefore, defendant's minimum sentence did not exceed the applicable enhanced guidelines range. A sentence within the guidelines is presumptively proportionate, and a proportionate sentence is not cruel or unusual; therefore, a sentence within the guidelines is presumptively not cruel or unusual. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). We conclude that defendant has failed to overcome this presumption of proportionality.

### III. DEFENDANT’S STANDARD 4 BRIEF

In a supplemental brief filed in propria persona pursuant to Supreme Court Administrative Order No. 2004–6, Standard 4, defendant raises additional issues regarding his trial counsel, sufficiency of the evidence, and two sentencing variables.

#### A. SUBSTITUTION OF TRIAL COUNSEL

Defendant argues that the trial court abused its discretion by denying his request for substitute counsel. An indigent defendant does not have the right to counsel of his choice, *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991), nor does he have an absolute right to substitution of counsel, *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001); *People v Meyers*, 124 Mich App 148, 165; 335 NW2d 189 (1983). An indigent defendant is entitled to substitution of appointed counsel for good cause when it does not disrupt the judicial process. *People v Strickland*, 293 Mich App 393, 397; 810 NW2d 660 (2011). A legitimate disagreement regarding a fundamental trial tactic constitutes good cause. *Mack*, 190 Mich App at 14. However, disagreements regarding trial strategy and professional judgment do not require substitution of counsel, especially where a motion would have been futile. *Strickland*, 293 Mich App at 398.

When defendant made his request for substitute counsel at the arraignment, the trial court did not abuse its discretion when it suggested that he give his attorney another chance. The trial court is granted discretion to decide whether defendant or his counsel were more credible regarding their relationship, see *id.*, and defendant did not raise any significant problems with his representation. Defendant later informed the trial court in writing that he still wanted a new attorney; however, he did not raise the issue in court again and, therefore, abandoned it. See *People v Moore*, 144 Mich App 104, 105; 372 NW2d 690 (1985) (holding that the defendant’s failure to advance his claim in the trial court constituted abandonment of that claim).

#### B. SUFFICIENCY OF THE EVIDENCE

Next, defendant maintains that there was insufficient evidence to support his conviction because there were gaps in the evidence, and the verdict required speculation. In particular, he notes that the cousin testified that the gun was in defendant’s right hand but he was actually left-handed, and the interview video depicted him writing with the left hand. However, we find that it was believable that, as the cousin testified, defendant was fighting off the victim with his left hand while wielding the gun with his right. Further, it was more believable that the victim asked his cousin to drive away while defendant was still in the car because he was struggling for his life, rather than because he was attempting to steal the gun. Defendant’s arguments here are cursory and unpersuasive. Moreover, none of the alleged “gaps” in the evidence identified by defendant change the fact that there was sufficient evidence, when viewed in the light most favorable to the prosecution, to prove defendant guilty of second-degree murder beyond a reasonable doubt, as discussed *supra*.

Defendant also argues that the law in this state is unclear regarding whether the malice element of second-degree murder requires a subjective awareness that one’s actions were dangerous and the probable result or natural tendency was to cause death or great bodily harm. The Supreme Court has described the third type of malice as “the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.” *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). The Court recognized that unusual

circumstances might require an analysis into whether a defendant was subjectively unaware of the risk of his actions because he was less intelligent or more intoxicated than the average person; however, the Court declined to decide whether a subjective or objective standard was appropriate because there was sufficient proof under either standard in that case.

In the present case, defendant offered no evidence that he was under the influence or less intelligent than the average person. Therefore, we find that, under *Goecke*, 457 Mich at 464, it was appropriate for the trial court to apply an objective standard, and this case did not involve unusual circumstances under which the issue of a subjective standard should even arise. Accordingly, defendant has not shown that either “gaps” in the evidence or uncertainty about the malice element of second-degree murder were sufficient to raise reasonable doubts in the jurors’ minds that defendant was guilty of second-degree murder.

### C. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant failed to preserve his numerous ineffective assistance of counsel arguments by requesting an evidentiary hearing in the lower court under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). See *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). This Court denied his motion to remand for an evidentiary hearing. Therefore, our review is limited to mistakes apparent on the record. See *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). We review an ineffective assistance of counsel issue to determine whether the attorney’s performance fell below an objective level of reasonableness and the defendant was denied a fair trial as a result. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Defendant first argues that his counsel was ineffective for failing to call certain witnesses. A defendant’s right to counsel includes the right to have all substantial defenses investigated, prepared, and presented. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009); *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). A defendant must show that he made a good faith effort to avail himself of the right to present a particular defense and the defense was substantial. *Ayres*, 239 Mich App at 22. A substantial defense is any that might have changed the outcome of the case. *Id.* A decision whether to call witnesses is presumed to be sound trial strategy, and the defendant must, therefore, establish that the failure to call a witness deprived him of a substantial defense. *People v Meissner*, 294 Mich App 438, 460; 812 NW2d 37 (2011). The defendant must establish beyond mere assertions that the witnesses would have assisted his case. *Id.*

Defendant contends that his trial counsel failed to interview the person with defendant in the car, who would have testified that the decedent tried to take the gun and then the struggle began. He also challenges his counsel’s failure to interview the witnesses who had contact with the body after the incident and may have taken the money or seen someone retrieve items from the car, showing that defendant did not rob the victim. However, defendant has not offered any proof that these potential witnesses were available to testify, would have testified on his behalf, or assisted his case. Accordingly, defendant has failed to demonstrate any prejudice from trial counsel’s alleged failure.

Defendant also argues that his counsel was ineffective because he did not argue self-defense and request a self-defense instruction; however, that theory would have conflicted with defendant’s claim that the shooting was an accident. However, we conclude that defendant has failed to overcome the presumption that trial counsel’s actions constituted reasonable trial strategy. It was a reasonable strategy for defense counsel to create uncertainty about what happened in the car, who

fired the gun, and whether it was an accident. A strategy is not ineffective assistance merely because it did not work. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant argues further that his trial counsel provided ineffective assistance because he did not object to the medical examiner testifying regarding an autopsy report that he did not prepare. The accused in any state or federal criminal prosecution has the right to be confronted with the witnesses against him. Const 1963, art 1, § 20; US Const, Am VI; *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). This prohibits testimonial statements of witnesses that do not appear at trial, unless they are unavailable and the defendant had a prior opportunity to cross-examine. *Crawford*, 541 US at 52-53. An autopsy report prepared in anticipation of litigation is testimonial evidence to which the confrontation clause applies. *People v Lewis (On Remand)*, 490 Mich 921; 806 NW2d 295 (2011).

However, even assuming the medical examiner's report would have been deemed inadmissible had counsel objected, defendant has failed to demonstrate that the admission of the report prejudiced his case. It was not disputed that the gun was fired inside the car and the victim died as a result of the gunshot; to the contrary, defendant argued that the gun fired accidentally as a result of the victim trying to take the gun from defendant. Thus, there is not a reasonable probability that counsel's error affected the outcome of the proceedings.

Defendant also argues that his counsel was ineffective for failing to challenge prospective jurors who were victims of armed robbery, had relatives who were victims, knew police officers, or previously served on a criminal jury.

The record in this case shows that each of these prospective jurors stated that he or she would be fair and impartial. When a potential juror swears that he will put aside preexisting knowledge and opinions, the initial presumption is that he is telling the truth. *People v Cline*, 276 Mich App 634, 638; 741 NW2d 563 (2007). There was no reason to believe otherwise of these jurors. Even a close personal relationship with a police officer is insufficient reason. See *People v Lee*, 212 Mich App 228, 250; 537 NW2d 233 (1995). An attorney does not have a duty to make a meritless argument. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Thus, defendant has failed to demonstrate ineffective assistance of counsel.

Similarly, defendant also questions why his trial counsel did not challenge a woman with admitted memory problems. However, that decision was not unreasonable and did not constitute ineffective assistance of counsel because the juror indicated she would be capable of performing her duties as long as she could take notes, and the trial court indicated that note taking was permitted.

Defendant also claims that his trial counsel's advice denied him his constitutional right to testify in his own defense. See *People v Bonilla-Machado*, 489 Mich 412, 419; 803 NW2d 217 (2011). However, defendant told the trial court that he did not want to testify after consulting with his attorney, even after the court cautioned him that it should be his own decision. There is no evidence that defense counsel coerced defendant by advising him of the legitimate risks of testifying. See *Id.* at 421. Thus, defendant has not demonstrated ineffective assistance of counsel.

#### D. SCORING OF SENTENCING GUIDELINES

Finally, defendant challenges the scoring of offense variables three and five.<sup>1</sup> Defendant did not preserve these arguments for review by objecting in the trial court, see *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000); therefore, review is limited to plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

We find that defendant has failed to demonstrate plain error affecting his substantial rights in regard to the scoring of either offense variable.

Under the third offense variable (OV 3), the sentencing court correctly scored twenty-five points for a "life threatening or permanent incapacitating injury." MCL 777.33. Defendant fails to realize that these points were scored for the victim's death, as the highest score permissible when the sentencing offense was homicide. See *People v Houston*, 473 Mich 399, 407; 702 NW2d 530 (2005). Under offense variable five (OV 5), fifteen points were correctly awarded because the victim's family suffered "[s]erious psychological injury requiring professional treatment," MCL 777.35, as established by uncontested information in the presentence investigation report (PSIR). Specifically, the PSIR reports that the victim's mother was in counseling and the victim's brother was suffering emotionally. Defendant did not object to the PSIR.

### III. CONCLUSION

In summary, we affirm defendant's convictions of second-degree murder, felon in possession of a firearm, and possession of a firearm during the commission of a felony and the sentences he received as a second-offense habitual offender.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Christopher M. Murray  
/s/ Michael J. Riordan

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<sup>1</sup> Although defendant's question presented references offense variables three and nine, his analysis addresses offense variables three and five.